APPEAL NO. 93380

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing (CCH) was originally held in (city), Texas, with (hearing officer) presiding as hearing officer, eventually concluding sometime in December 1992. This panel reversed the decision of the hearing officer, finding that the improper version of the American Medical Association Guides to the Evaluation of Permanent Impairment, third edition (hereinafter AMA Guides), had been used and that the parties had not been afforded an opportunity to respond to the hearing officer's determination invalidating the designated doctor's report on the basis that the improper version of the AMA Guides had been used. A hearing on remand was conducted on April 19, 1993, and the evidence set out in the original hearing on September 29, 1992, was "adopted by reference in its entirety." The hearing officer, apparently "by letter dated 04-12-93 . . . asked that the designated doctor re-evaluate his rating for CLAIMANT by using the correct version of the AMA Guides and report that rating to the Commission before the 04-19-93 hearing on remand." The hearing officer's letter is not in the record or the file before us. The designated doctor replied by letter dated 4-16-93 assigning a 17% whole body impairment rating.

The appellant, claimant herein, asserts that the hearing officer erred in "failing to subpoena the designated doctor as requested by claimant;" that the hearing officer erred in considering the designated doctor's letter (regarding use of the inclinometer at the first hearing) "which failed to answer questions, since that letter was not a proper affidavit . . .;" that the presumptive weight given to a designated doctor's report "is inherently unreasonable and unfair" and unconstitutional; and that "the great weight of medical evidence properly offered in this case is contrary to the designated doctor." Respondent, carrier, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

The basic facts of this case, which are set out in the first decision by this panel, *see* Texas Workers' Compensation Appeal No. 93028, decided February 26, 1993, are not at issue and will not be repeated at length herein. Claimant was a bank teller who injured her back lifting a box of rolled coins. She saw (Dr. OL), claimant's treating physician, who on September 17, 1992, by TWCC-69 (Report of Medical Evaluation) assessed a 30% impairment rating. Carrier disputed this impairment rating and (Dr. DE) was designated by the Texas Workers' Compensation Commission (Commission) to examine claimant and determine an impairment rating. By report dated May 19, 1992, Dr. DE assigned a 17% whole body impairment rating. Claimant returned to Dr. OL, who, on August 13, 1992, assigned a 25% whole body impairment rating. The principal point of contention at the first hearing was whether Dr. DE had used a "Sears Craftsman protractor or compass" in examining claimant or whether he had used an inclinometer. A physical therapist, upon whose figures Dr. OL based his rating, testified at the first hearing that he had checked Dr.

DE's figures and determined that the computations were correct. The testimony at the first CCH was that the difference in Dr. OL's and Dr. DE's ratings was that Dr. DE did not give as much weight to loss of sensation and loss of strength as did Dr. OL. With the permission of the parties, the hearing officer on October 8, 1992, sent a letter to Dr. DE, the designated doctor, inquiring as to the device and brand name of the specific instrument he had used for range of motion tests. Dr. DE responded stating use of inclinometers are appropriate and he had used "2 standard gravity inclinometers" and then gratuitously added he had used the AMA Guides "3rd edition revised" (an improper version of the AMA Guides). Dr. DE's response was made available to the parties and the hearing officer stated if the parties wanted a further evidentiary hearing they were to contact him (the hearing officer). Claimant by letter dated December 1, 1992, said the designated doctor had failed to answer the question of the brand name of the inclinometer and stated Dr. DE should be required to answer the question "or be required to attend an additional hearing." The hearing officer replied by letter dated December 9, 1992, ". . . upon reflection I do not think that the brand name [of that instrument] would have any appreciable impact on the decision in this case." The hearing officer without soliciting further comment or evidence invalidated Dr. DE's rating based on Dr. DE's gratuitous remark that he had used the AMA Guides "Third Edition (Revised)" and accepted the treating doctor's 25% impairment rating. The carrier appealed on the basis that "no evidence was taken as to whether there was any difference" between the AMA Guides mandated by Article 8308-4.24 and the AMA Guides third edition, revised. Claimant did not appeal or file a response. We reversed on the basis that no effort had been made to refer the report back to the designated doctor for correction or to notify the parties and afford them an opportunity to respond or comment on the effect of using the improper version of the AMA Guides.

As noted, another CCH was convened on April 19, 1993, where the designated doctor's (Dr. DE) response dated 4/16/93 was admitted into evidence as Hearing Officer Exhibit No. 2. That report states:

> I reviewed [claimant's] impairment rating using the 2nd edition, second printing (unrevised) and her impairment rating does not change; it remains 17% whole body.
>
> Combine 9% for surgically treated disc with residual (IIE, table 49, pg 73) with 8% for loss of AROM (see attached) give 16%. This 16 is combined with 1% for loss of sensation (C6 nerve 8%; table 12 pg 41) X 15% (table 10 pg 40; decreased sensation forgotten during activity) this gives 2% upper extremity converted to 1% whole. Hence, total impairment is 17% when using either edition.

Claimant only testified regarding the phrase "decreased sensation forgotten during activity" used in the report, arguing the doctor could not arrive at that conclusion without asking her or observing her over a period of time and he did neither. Claimant testified she continues to have numbness from her elbow to her thumb. Claimant called a friend to testify that claimant complained about not having feeling in the arm since the injury. The carrier offered no testimony or evidence. We note that claimant did not ask for Dr. DE to

be subpoenaed or renew claimant's request to be allowed to cross-examine Dr. DE on the issue of the name brand of the inclinometer used. Claimant, only in closing, casually comments that Dr. DE did not address or answer the questions about the inclinometer posed by the hearing officer at the first hearing. Carrier in closing only remarks that Dr. DE is much more qualified than the physical therapist, whose figures Dr. OL is using to challenge Dr. DE.

The hearing officer specifically finds that the designated doctor used an inclinometer for range of motion tests and that the re-evaluation of the impairment rating of 17% assigned to claimant by the designated doctor was based on the mandated version of the AMA Guides. Further, the hearing officer finds that claimant's whole body impairment rating would be 17% based on either version of the AMA Guides. The hearing officer gave presumptive weight to the designated doctor's 17% impairment rating.

Claimant in this appeal, for the first time alleges the hearing officer erred at the first CCH in failing to subpoena the designated doctor as requested by claimant (at the first CCH). Claimant did not preserve that point of error by appealing the first CCH. In fact claimant did not even respond to carrier's request for review of the first CCH. When the case was reversed and remanded for the development of appropriate evidence regarding which version of the AMA Guides had been used and affording the parties an opportunity to respond regarding the validity of Dr. DE's rating, claimant did not renew her request that Dr. DE be subpoenaed or that further efforts be made to ascertain the type and brand name on the specific instruments used by the designated doctor. Claimant's point is not well taken in that the issue of whether the hearing officer abused his discretion in refusing to issue a subpoena, if he was ever asked to do so, was never before the Appeal Panel and certainly was not an issue in the case on remand.

Claimant alleges that the letter sent by the designated doctor in response to the hearing officer's questions should not have been considered because it was "nonresponsive," not in proper affidavit form and did not comply with Texas Workers' Compensation Rule 142.13 (Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §142.13) and the Texas Rules of Civil Procedure. First we note that the Texas Rules of Civil Procedure do not control in CCHs. *See* Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992, and Article 8308-6.01(b). Further, we do not read Rule 142.13 to require that responses from physicians to a hearing officer must be in affidavit form and, contrary to claimant's assertion, we consider a response by a doctor, on a medical subject, to a hearing officer's inquiry to be a report from the doctor. Even if this were not the case, the doctor's letter is a written statement signed by the witness and therefore may be admitted at the hearing officer's discretion in accordance with Article 8308-6.34(e). Claimant's point on this matter is without merit.

Claimant next contends that giving the designated doctor's report presumptive weight is "inherently unreasonable and unfair" and denies claimant property rights without due process under "the Constitution of the United States." We have held that this panel is not the proper forum to adjudicate Constitutional questions. *See* Texas Workers' Compensation Commission Appeal No. 92391, decided September 16, 1992 and Texas

Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992. Furthermore, Articles 8308-4.25(b) and 4.26(g) specifically establish the designated doctor procedure and state "the report of the designated doctor shall have presumptive weight . . . unless the great weight of the other medical evidence is to the contrary . . . ." Claimant's point on this issue is without merit.

Finally, the claimant argues that the designated doctor's report has been overcome by the great weight of the other medical evidence, citing the treating doctor's evaluations and alleging "there was no evidence presented controverting the treating physician's medical evaluation." In Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, we discuss at some length the designated doctor's position and that it takes more than a mere balancing of the evidence to overcome the designated doctor's opinion and ". . . that no other doctor's report including a report of a treating doctor, is accorded this special, presumptive status." *Also see* Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. Further, testimony by the claimant that the instrument used was "inferior equipment" and that the claimant's testimony about "decreased sensation which was forgotten during activity" constitutes lay testimony. We have held that a claimant's lay testimony does not constitute medical evidence that can be considered in determining whether the "great weight" rebuts the "presumptive weight." *See* Texas Workers' Compensation Commission Appeal No. 93072, decided March 12, 1993; Texas Workers Compensation Commission Appeal No. 93614, decided June 5, 1992 and Texas Workers' Compensation Commission Appeal No. 93295, decided June 2, 1993.

Accordingly, we find there is sufficient evidence to support the hearing officer's determinations and there is no sound basis to disturb his decision. Only if we were to find that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside the decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided June 20, 1992.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge